



Department of Transportation

National Highway Traffic Safety Administration

[Docket No. NHTSA-2013-0038; Notice 2]

RECARO Child Safety, LLC, Denial of Petition for
Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA),
Department of Transportation (DOT)

ACTION: Denial of Petition

SUMMARY: This document denies RECARO Child Safety, LLC's (RECARO)¹ petition for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that a noncompliance with Federal Motor Vehicle Safety Standard (FMVSS) No. 213, *Child Restraint Systems*, is inconsequential to motor vehicle safety. NHTSA has decided that RECARO has not met its burden of persuasion that the FMVSS No. 213 noncompliance is inconsequential to motor vehicle safety. Accordingly, RECARO must notify owners, purchasers, and dealers pursuant to 49 U.S.C. 30118 and provide a remedy in accordance with 49 U.S.C. 30120.

ADDRESSES: To view the petition and all supporting documents, log onto the Federal Docket Management System (FDMS) Web site

¹ RECARO Child Safety, LLC is a manufacturer of motor vehicle equipment and is registered under the laws of the state of Michigan.

at: <http://www.regulations.gov/>. Then follow the online search instructions to locate docket number "NHTSA-2013-0038."

CONTACT INFORMATION: For further information on this decision contact Mr. Zack Fraser, Office of Vehicle Safety Compliance, the National Highway Traffic Safety Administration (NHTSA), telephone (202)366-5754, facsimile (202) 366-7002.

SUPPLEMENTARY INFORMATION:

RECARO determined that certain RECARO brand ProSport child restraint systems produced between June 16, 2010 and January 31, 2013 do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 213, *Child Restraint Systems*. RECARO filed a report with NHTSA dated February 6, 2013, pursuant to 49 CFR Part 573, *Defect and Noncompliance Responsibility and Reports*.

Pursuant to 49 U.S.C. 30118(d) and 30120(h) (see implementing rule at 49 CFR Part 556), RECARO submitted a petition for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

NHTSA published a notice of receipt of the petition, with a 30-day public comment period, on June 3, 2013, in the Federal Register (78 FR 33150). NHTSA did not receive any comments in response to the petition.

EQUIPMENT INVOLVED: Affected are approximately 39,181 RECARO brand ProSport child restraint systems produced between June 16, 2010, and January 31, 2013.

RULE TEXT: Paragraph S5.3.1(a)(1) of FMVSS No. 213 lays out head excursion requirements for child restraint systems. This paragraph states, in relevant part:

S5.1.3.1 Child restraint systems other than rear-facing ones and car beds.

Each child restraint system, other than a rear-facing child restraint system or a car bed, shall retain the test dummy's torso within the system.

(a) For each add-on child restraint system:

- (1) No portion of the test dummy's head shall pass through a vertical transverse plane that is 720 mm or 813 mm (as specified in the table in this S5.1.3.1) forward of point Z on the standard seat assembly, measured along the center SORL (as illustrated in figure 1B of this standard)...

Paragraph S5.3.2 of FMVSS No. 213 identifies the various installation configurations (i.e. with a lap belt only, with a lap belt and upper torso restraint, etc.) that must be tested for each type of child restraint system. This paragraph states, in relevant part:

S5.3.2 Each add-on child restraint system shall be capable of meeting the requirements of this standard when installed solely by each of the means indicated in the following table for the particular type of child restraint system.

This is followed by Table S5.3.2 which lists the different child restraint systems ("Harness...", "Other harnesses," "Car beds," "Rear-facing restraints," "Belt-positioning seats," and "All other child restraints"). For each type of child restraint system, the table identifies various means of installation ("Type 1 seat belt assembly," "Type 1 seat belt assembly plus a tether anchorage, if needed," "Child restraint anchorage system," "Type II seat belt assembly," and "Seat back mount"). The ProSport, which is a forward facing only child restraint system, falls under the category of "All other child restraints" in table S5.3.2 of FMVSS No. 213. According to Paragraph S5.3.2 of FMVSS No. 213, the ProSport must meet FMVSS No. 213's requirements when installed with a "Type 1 seat belt assembly" or a lap belt only, among other things. See 49 CFR §571.209 S.3, Seat Belt Assemblies (A "[t]ype 1 seat belt assembly is a lap belt for pelvic restraint").

The test procedure for restraint systems installed with a lap belt only is set forth in Paragraph S6.1.2(a)(1)(i)(D) of FMVSS No. 213, which states, in relevant part:

S6.1.2 Dynamic Test Procedure.

- (a) Activate the built-in child restraint or attach the add-on child restraint to the seat assembly as described below:

- 1. *Test Configuration I.*

- i. *Child restraints other than belt-positioning seats.* Attach the child restraint in any of the following manners specified in S6.1.2(a)(1)(i)(A) through (D), unless otherwise specified in this standard.

...

- (D) Install the child restraint system using only the lower anchorages of the child restraint system as in S6.1.2(a)(1)(i)(C). No tether strap (or any other supplemental device) is used.

The other test configurations (described in Paragraph S6.1.2(a)(1)(i)(A)-(C)) do not correspond to the lap belt only test.

SUMMARY OF RECARO'S POSITION: RECARO explains that its ProSport child restraint system does not comply with the head excursion requirements of FMVSS 213 S5.1.3.1(a)(1) when subjected to the dynamic test requirements of S6.1.2(a)(1)(i)(D) of FMVSS No. 213, using a six year old test dummy secured to the test bench by lower anchors and no tether. RECARO believes that this noncompliance is inconsequential to motor vehicle safety, and requests an exemption from the notification requirements of 49 U.S.C. 30118 and the remedy requirements of 49 U.S.C. 30120.

In support of its petition for exemption, RECARO submits the following comments and data:

1. The dynamic test requirements of FMVSS No. 213

S6.1.2(a)(1)(i)(D) require using a six year old test dummy

secured to the test bench using lower anchors and no tether. This test procedure is a direct violation of the instructions and warnings in the instruction manual included with each ProSport child restraint system and would constitute a major misuse of the child restraint by the consumer. (RECARO provided the entire manual as part of its petition.)

2. RECARO has received over 9,000 registration cards returned by purchasers of the ProSport. Using the on-line survey system Survey Monkey, RECARO instituted a survey of 3,690 registered owners by e-mailing each purchaser the following survey questions:
 - a. Are you currently using your ProSport child restraint?
 - b. How is (was) your ProSport installed in the vehicle?
 - i. Vehicle lap/shoulder belt
 - ii. Lower anchors provided with child restraint
(LATCH)
 - c. Did you use the top tether included on the ProSport to install the child restraint into the vehicle?

RECARO noted that 929 registered owners responded to the survey by confirming that they installed the child restraint with lower LATCH anchors. Of those responding, 837 or 90.1% confirmed that the top tether was being used to install their ProSport when installing the child

restraint with lower LATCH anchors. (RECARO included a copy of the survey details and results as part of its petition.) RECARO stated its belief that the survey is a statistically significant confirmation that a very small percentage of ProSport consumers are misusing the child restraint by not using the top tether when installing the child restraint with lower LATCH anchors and that the effectiveness of any noncompliance notification campaign will be minimal, given the historically low response rate to technical noncompliance notification campaigns of child restraints. For example, the survey results indicate that only those ProSport consumers not properly using the top tether when installing the child restraint with lower LATCH anchors are likely to respond to a noncompliance notification. Assuming a response rate of 10% by this group, only 400 of the estimated 4,000 consumers misusing the child restraint are likely to respond. This statistically insignificant response renders the technical noncompliance at issue inconsequential.

3. All vehicles equipped with lower child restraint (LATCH) anchors are also equipped with top tether anchors. RECARO has received 82 consumer calls regarding the ProSport. (RECARO included copies of consumer call reports as part of its petition.) No consumer has questioned the use of

the tether when securing the ProSport with the lower anchors. RECARO has no information of this misuse actually occurring in the field or of any injuries sustained by a child when restrained in a ProSport in this misuse condition.

4. RECARO has received notice of three crashes involving four children seated in ProSport child restraint systems. In these incidents, the ProSport performed well and the occupant was not injured. It is not known if the ProSports involved were installed using the lower LATCH anchors, whether the top tethers were used, or both.
5. RECARO has implemented an engineering/structural modification to the ProSport. Dynamic tests of the modified ProSport using a Hybrid II six year old test dummy secured to the test bench using lower anchors and no tether confirm that the head excursion requirements of FMVSS No. 213 S5.1.3.1(a)(1) are met. (RECARO included copies of the test reports as part of its petition.)
6. RECARO stated its belief that the ProSport outperforms any comparable child restraint with regards to head excursions when installed with the lap/shoulder belt.
7. Given the relative small number of ProSport child restraints distributed since introduction in June 2010 (39,181), the effectiveness of any notification campaign

regarding this technical noncompliance will be limited.

Additionally, any noncompliance notice campaign may result in consumers deciding to discontinue using their ProSport for a period of time, increasing the risk of injury to a higher degree than the risk resulting from the small number of consumers misusing the child restraint by not using the top tether when installing the child restraint with lower LATCH anchors.

RECARO has additionally informed NHTSA that it has stopped production of the ProSport as of January 31, 2013.

STANDARD OF REVIEW: Federal motor vehicle safety standards are adopted only after the agency has determined, following notice and comment, that the performance requirements are objective and practicable and "meet the need for motor vehicle safety." 49 U.S.C. 30111(a). Thus, there is a general presumption that the failure of a motor vehicle or item of motor vehicle equipment to comply with a FMVSS increases the risk to motor vehicle safety beyond the level deemed appropriate by NHTSA through the rulemaking process. *General Motors Corp; Ruling on Petition for Determination of Inconsequential Noncompliance*, 69 FR 19897 (April 14, 2004). To protect the public from such risks, manufacturers whose products fail to comply with a FMVSS are normally required to conduct a safety recall under which they

must notify owners, purchasers, and dealers of the noncompliance and provide a remedy without charge. 49 U.S.C. 30118-30120.

However, Congress recognized that under some limited circumstances, a noncompliance may be "inconsequential" to motor vehicle safety. It established a procedure under which NHTSA may consider whether it is appropriate to exempt the manufacturer from the duty to conduct a notification and remedy (recall) campaign. 49 U.S.C. 30118(d) and 30120(h). The agency's regulations governing the filing and consideration of petitions for inconsequentiality exemptions are set out in 49 CFR Part 556. The manufacturer bears the burden of demonstrating that the noncompliance is inconsequential to motor vehicle safety. *General Motors*, 69 FR 19899.

NHTSA rarely grants inconsequentiality petitions for noncompliance of performance standards. The majority of the inconsequentiality petitions NHTSA has granted have been for noncompliances with labeling requirements. For a performance-related petition to be granted, NHTSA has determined the issue to be "whether [the] particular noncompliance is likely to increase the risk to safety." *Cosco, Inc.: Denial of Application for Decision of Inconsequential Noncompliance*, 64 FR 29408 (June 1, 1999). In evaluating whether there is an increased safety risk, NHTSA examines the motor vehicles or

equipment exhibiting the noncompliance at issue. *Cosco*, 64 FR 29409.

NHTSA'S DECISION: NHTSA has reviewed RECARO's arguments and is not convinced that the ProSport child restraint's noncompliance is inconsequential to motor vehicle safety. The petition is denied. Below, we address each of RECARO's arguments in the order presented.

In its petition, RECARO first characterizes the installation of the ProSport without a top tether as misuse, citing the ProSport instruction manual. The instruction manual, however, does not exempt the ProSport from the requirements of FMVSS No. 213. Independent of any instruction manual, FMVSS No. 213 requires that the ProSport meet FMVSS No. 213's dynamic test requirements when installed without the top tether. The ProSport's head excursion measurements were above the acceptable limit prescribed in paragraph S5.1.3.1(a) of FMVSS No. 213. The head excursion limit is 813 millimeters. When tested, ProSport had a head excursion measurement of 907 millimeters according to NHTSA's test, and an even greater deviation according to RECARO's test. Failure of a child restraint system in this manner increases the likelihood of head injury to the occupant, which is not insignificant or inconsequential to safety. See *Cosco*, 64 FR 29409-29410. NHTSA requires child restraint systems to be tested without the tether strap attached to the

vehicle to "ensure that a minimum level of safety is provided by child restraints which have safety features likely to be misused or unused by some owners." See Notice of Proposed Rulemaking, 50 FR 27634 (July 5, 1985); Final Rule, 51 FR 5335 (February 13, 1986) (amending FMVSS No. 213 by requiring child restraints equipped with a tether strap to pass the 30 mile per hour (mph) test without attaching the tether strap due to evidence of misuse by owners). Because the test the ProSport failed was intended to protect those children whose parents misused the child restraint system by not attaching the top tether strap, Recaro's argument is unavailing. NHTSA has concerns that there is an unreasonable risk of head injury to children in the event of a crash when the ProSport is not installed properly. The head excursion limit is a fundamental requirement that represents basic parameters of survival in a crash environment. *California Strolee, Inc.; Denial of Petition for Determination of Inconsequential Noncompliance*, 51 FR 13389 (April 2, 1986). Any relaxation would reduce child safety below an acceptable level. *Id.*

Second, RECARO conducted a survey which found that 9.9% of ProSport consumers do not use the top tether when installing the child restraint system.² Based on this statistic, RECARO

² RECARO noted that 929 registered owners responded to the survey by confirming that they installed the child restraint with lower LATCH anchors. Of those responding, 837 or 90.1% confirmed that the top tether was being

concludes that a "very small percentage" of ProSport consumers do not use the top tether. This survey does not convince NHTSA that the ProSport's noncompliance is inconsequential to motor vehicle safety. While 9.9% of 39,181 child restraint systems is by no means a small number, arguments that only a small number of items of motor vehicle equipment are affected by a noncompliance will not justify granting an inconsequentiality petition. *General Motors*, 69 FR 19990. The key issue in determining inconsequentiality is not the aggregate safety consequence among all drivers, but rather, "whether the noncompliance is likely to increase the safety risk to the individual occupants who experience the type of injurious events against which the standard is designed to protect." *Id.*; See also *Cosco*, 64 FR 29409.

Third, RECARO states that based on 82 consumer calls regarding the ProSport (presumably out of a population of 39,181 child restraint systems), it has no information that a consumer has (1) failed to use the top tether; or (2) sustained injury due to failure to use the top tether. This claim does not advance RECARO's argument. RECARO's own survey indicated that 9.9% of survey respondents failed to use the top tether. More importantly, the statute does not require children to sustain

used to install their ProSport. The remaining 89 individuals, or 9.9% of respondents indicated that they did not use the top tether.

injuries for a manufacturer to conduct a recall. The statute calls for notification and remedy when the manufacturer "decides in good faith that the ... equipment does not comply with an applicable motor vehicle safety standard..." 49 U.S.C. 30118(c)(2); 49 U.S.C. 30120.

Fourth, RECARO indicated in its petition that it received notice of three crashes involving four children seated in the subject child restraint systems. The children survived the crashes without injury. However, this information does not advance RECARO's position that the ProSport's noncompliance is inconsequential to motor vehicle safety because RECARO has not proven that the top tether was not attached in those cases.

Fifth, RECARO also stated that it implemented engineering/structural modifications to the ProSport. RECARO performed dynamic tests of the modified ProSport and confirmed that the modified child seats met the requirements of FMVSS No. 213. However, these modifications were not made to the 39,181 restraints that are the subject of this petition. This argument is not relevant to RECARO's petition. If anything, it may indicate that RECARO recognizes that the noncompliance in its earlier ProSport models must be rectified.

Sixth, RECARO contends that a recall campaign would have limited effectiveness based on its survey results. However, RECARO has presented no evidence to support this claim. NHTSA

does not agree that optional responses to a survey are indicative of responsiveness to a recall campaign, which has direct safety consequences.

Finally, RECARO contends that a recall campaign may result in consumers deciding to discontinue use of their ProSport child restraints. RECARO claims that non-use of the ProSport increases the risk of injury to a higher degree than misuse of the ProSport. Yet RECARO has provided no evidence that owners will discontinue use of a child restraint system altogether in the face of a RECARO recall. Further, child restraint recall campaign notices for similar noncompliances have generally instructed owners to continue using a restraint until a remedy is available (rather than not using any child restraint). NHTSA does not consider this to be a compelling argument.

In consideration of the foregoing, NHTSA has decided that the ProSport's noncompliance is likely to increase the risk to safety, and is therefore not inconsequential. Recaro has not met its burden of persuasion that the FMVSS No. 213 noncompliance identified in RECARO's noncompliance information report is inconsequential to motor vehicle safety. Accordingly, RECARO's petition is hereby denied, and RECARO must notify owners, purchasers, and dealers pursuant to 49 U.S.C. 30118 and provide a remedy in accordance with 49 U.S.C. 30120.

AUTHORITY: (49 U.S.C. 30118, 30120: delegations of authority at
49 CFR 1.95 and 501.8)

ISSUED ON: March 25, 2014.

Nancy Lummen Lewis
Associate Administrator
for Enforcement

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